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291149—41——1



In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 693

NORMAN BAKER, R. A. BELLOWS, AND J. L. STATLER, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 1189–1207) is reported in 115 F. (2d) 533. The trial court's charge to the jury appears at R. 888–908.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 20, 1940 (R. 1207–1208). A petition for rehearing (R. 1209–1217) was denied on December 7, 1940 (R. 1219). The petition for writ of certiorari was filed January 13,

1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated May 7, 1934.

QUESTIONS PRESENTED

1. Whether the ~~conduct of the~~ prosecuting attorneys engaged in misconduct which deprived the petitioners of a fair trial.

2. Whether the trial court erred in excluding hearsay evidence offered by petitioners to show good faith.

3. Whether the trial court erred in refusing to instruct the jury to disregard misrepresentations which the defendants assert were not proved.

4. Whether the court erred in instructing that in determining the good faith of defendants the jury might consider whether the defendants made misrepresentations willfully and recklessly, negligently or without proper investigations.

5. Whether there was sufficient evidence to warrant the submission of the case to the jury.

STATUTE INVOLVED

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C., Title 18, Section 338) are as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, repre-

> sentations, or promises, * * * shall, for the purpose of executing such scheme or artifice * * * knowingly cause to be delivered by mail * * * any * * * letter, * * * package, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both (R. S. § 5480; Mar. 2, 1889, c. 393, § 1, 25 Stat. 873; Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130).

STATEMENT

On September 20, 1939, an indictment in seven counts was returned against the petitioners and others, in the United States District Court for the Eastern District of Arkansas (R. 1–40). The indictment charged that the defendants, having devised a scheme to defraud and to obtain money by false and fraudulent pretenses, caused to be delivered by mail, in furtherance of the scheme, the letters, pamphlets and parcel described in the seven counts. The petitioners were convicted on all counts (R. 62–64).[1] Baker was sentenced to imprisonment for four years and fined $4,000 (R. 64–65). Bellows was sentenced to imprisonment for two years (R. 66–67) and Statler to imprisonment for one year and a day (R. 67–68).

The scheme alleged was, in substance, fraudulently to induce people to come to the Baker Institute at Muscatine, Iowa, and the Baker Hospital

[1] The prosecution was dismissed, on motion of the Government, as to four of the defendants (R. 365, 752) and one was acquitted by the jury's verdict.

at Eureka Springs, Arkansas, for sham medical treatment, the nature and efficacy of which were grossly misrepresented in radio broadcasts, letters, pamphlets, advertisements, etc. The knowingly false representations alleged were, *inter alia,* that cancer could not be cured by surgery, X-ray, or radium treatments, the methods recommended by the American Medical Association; that the defendant Baker had discovered and perfected a sure cure for cancer; that thousands of persons had been cured of cancer in a short time by this method, many of them after they had been given up to die by the "regular" medical profession; that the cost of the treatment at the Baker institutions was very small and that only licensed and highly competent members of the medical profession—who were not members of the American Medical Association—were employed to administer the treatment. Similar misrepresentations were alleged as to the efficacy of the Baker treatment in curing a host of other diseases.

At the trial, there was substantial evidence of the following facts:

Baker established the Baker Institute at Muscatine, Iowa, in 1929 (R. 93, 650, 79) where he had been in business, operated radio station KTNT and published a magazine TNT (R. 82, 125, 624). Bellows, who had been associated with him since 1926, was superintendent of the hospital (R. 615, 623) and Statler became Chief of Staff in

1930 (R. 651). The hospital was leased to others from time to time (R. 284, 293, 651) but Baker continued to concern himself with the way in which it was operated (R. 284, 287). In 1938, when the Baker Hospital at Eureka Springs, Arkansas, opened, the Muscatine institution was closed (R. 192, 261, 615, 626). Bellows became superintendent of the new hospital, Statler became medical "adviser" (R. 615, 651) and Beatty, whom the jury acquitted, became Chief of Staff (R. 665). Baker's radio station at Muscatine had been deprived of its license in 1931 (R. 626) but Baker had another station in Mexico (R. 626, 262, 193, 346). Neither Baker nor Bellows were physicians; Bellows had not graduated from "grade schools" (R. 623–624). Statler was licensed to practice in Missouri and, by reciprocity in Iowa, but was refused a license in Arkansas (R. 651–652). All three were financially interested in the hospital, as stockholders (R. 71, 633, 656) and along with Beatty, were in control of its operation (R. 311, 318, 329, 340–343, 358–359, 618–619, 656, 665).

From the establishment of the Baker Institute in November 1929, the treatments administered at the Baker institutions were extravagantly advertised to the public in a series of articles published in Baker's magazine "T. N. T." (R. 79–166), in reprints of these articles (R. 76, 79, 631), circulars (R. 193–197, 202–205, 215, 219–246, 247–263,

267–270, 272–278) mailed by the thousands (R. 294–296), letters to prospective patients (R. 192–193, 216–217, 266–267), broadcasts by Baker over his radio stations (R. 82, 91, 136, 193, 282, 346), and a book published in 1936 entitled "Doctors, Dynamiters and Gunmen" which purported to be a biography of Baker and was distributed by the hospitals (R. 167, 193).

Among the representations made were the following: "Cancer is conquered. The greatest discovery in medical science in years—a positive cure for cancer, that dread disease which has taken toll of millions of lives, caused thousands to commit suicide, and driven other thousands to insanity—has been revealed by an investigation conducted by Norman Baker" (R. 80–81); "Mr. Baker and his fellow investigators have seen with their own eyes enormous and malignant cancers in advanced stages of growth rapidly yield to a new and painless treatment, soften, and disappear" (R. 80–81); "a treatment has been found that permanently cures cancer" (R. 81); "Cancer is curable by Baker Treatment" (R. 193, 227, 233, 256); "Literally miracles have been performed by it. Thousands of cancer patients and other victims of nutritional diseases have been cured by it and restored to health and happiness" (R. 94); "X-ray scatters cancer, Radium simply retards its growth temporarily and recurrences are experienced after operation" (R. 80); the "leading physicians

know that cancer cannot be cured" by "the usual operations or X-ray or radium treatments" (R. 117); "We all realize that cancer returns after operations and practically always returns in a worse condition" (R. 165); "It would be hard to find an intelligent man or woman but who knows operation, radium, and X-ray causes recurrence. * * * We know that practically every cancer and tumor sufferer, who submitted to such treatments seven and eight years ago, is now dead" (R. 255); "When a cancer is cured by the knife you can put it down as 'not a cancer' " (R. 268); the "Baker Hospital cures by means of an intramuscular injection which kills the diseased cancer or tumor tissues and enables the blood to carry it away as waste" (R. 124); "An international group of Baker Hospitals and clinics in the United States, Mexico, and Australia now extend hope to cancer and tumor sufferers through the Baker treatments" (R. 220); when "a cure is not possible, life extension is possible by the Baker treatments" (R. 270); Baker "brought upon him the wrath, indignation, and condemnation of the American Medical Association and most all allopathic doctors * * * He dared to accomplish that which they were unable to do. He gave to the world a cure for cancer and tumor" (R. 244); it "is our great success, our rapid growth that maddens the organized doctors, who strive hard to mislead you and keep you from investigating this wonderful

institution" (R. 270); this "Hospital maintains a clinic of physicians whose records speak for themselves, and we believe that few, if any, can show records as successful in the treatments of cancer, tumors, goiter, gallstones, hemorrhoids, rheumatism, prostate, varicose veins, fistula, neuritis, appendicitis, kidney, bladder, stomach ulcers, stomach troubles" (R. 166); "We Guarantee Our Cures. We do Not remove organs from the body—We cure Without the knife" (R. 219); "We employ none but licensed, ethical, and experienced doctors who Are Not Members Of The American Medical Association, but independent, progressive, and experienced specialists" (R. 260).

The literature containing these representations is filled with supposed case histories and testimonials of cures (R. 80–92, 97–104, 106–109, 110, 113, 116, 124, 132–136, 139, 141, 154–155, 156–160, 172–182, 231–233, 235–237, 240–241, 246, 267, 272–275) and quotations attributed to medical authorities (R. 150–151, 195, 233, 247–254, 268). Five of these case histories (R. 85–92, 172–182), the "test patients" whom Baker sent to Dr. Ozias for treatment in 1929 (R. 182–183) and whose response to the treatment was said to have largely convinced Baker of its efficacy (R. 91–93, 182), were not in fact benefitted by the treatment and died between November 1929 and May 1930 (R. 183–190)—when the articles and reprints were being issued (R. 76, 79, 627–633). Their death was known at

the time, or shortly thereafter, to petitioner, Bellows (R. 627–633), who also went to Dr. Ozias for treatment (R. 632, 621–622) and made the "investigation" of the test patients (R. 627–633). Their death was brought out in a trial in 1932 to which Baker was a party (R. 631) but the distortion was repeated in the 1936 edition of the biography of Baker, though in somewhat different form (R. 172–182).

The treatment administered at the Baker institutions consisted primarily of two different injections called "Number Four" and "Number Five" (R. 323, 325, 366, 368, 687, 692) and also of diet, local applications, irrigation and tonic (R. 653–654, 659, 313, 657). The substances used for injections were analysed by Government chemists (R. 363). "Number Five" was found to consist of carbolic acid, glycerin and alcohol; and "Number Four" of hydrochloric acid, salt, phosphate and water (R. 363–365; see also R. 661). Cancer experts, including Dr. Francis Carter Wood (R. 394–416) and Dr. Max Cutler (R. 370–394) testified that these injections could have no beneficial effect upon cancer or any other disease; though carbolic acid might cure a minor surface affliction, it would destroy diseased and undiseased tissue indiscriminately (R. 375–376, 379, 391, 398–400, 427). Moreover, four of the men who administered the injections, including Beatty, the Chief of Staff, testified that they did

not know what they were injecting (R. 323, 324, 366, 368, 685). The injections were administered whatever the affliction (R. 325, 327); one of the men gave three hundred in a morning (R. 325). No microscopic examinations were made (R. 298, 309, 369, 299, 322). Cases were diagnosed on the basis of "case history," appearance and palpation (R. 369, 659, 686, 688, 692, 707). Colonics and vaginal packs, which a trained nurse would not administer herself, were given by a practical nurse with no hospital experience (R. 310). Beatty, who signed the death certificates (R. 695–706), admitted that he knew nothing about cancer, that he used to be a chiropractor and was not even that any more (R. 686); and there was evidence that he had bought his medical diploma from a school which had gone out of existence (R. 437–439). Statler's ignorance was fully revealed in his cross-examination (R. 654–661).

Cancer specialists testified to the acknowledged efficacy in many cases of surgery, X-ray and radium treatment and the importance of microscopic examination as an aid to diagnosis (R. 370–375, 377, 378, 383–385, 389, 396–397, 400, 411–412, 417, 419, 429, 431). According to Dr. Wood's testimony there "are probably a hundred thousand people in the United States cured of cancer and living, cured mostly by surgery, some by radium and X-ray—none by diet or anything else" (R. 400).

There also was evidence that Baker had said to a witness who told him "he was a fool to make some of the claims he made over the air" that "if he could keep the radio station open for a year he could make a million dollars out of the suckers" (R. 346–347).

The Circuit Court of Appeals held that there was "abundant evidence to sustain the verdict" (R. 1198) and the judgments of conviction were unanimously affirmed.

ARGUMENT

I

Petitioners contend that the prosecuting attorneys engaged in misconduct which deprived them of a fair trial (Petition pp. 11–13, 16–17; Brief pp. 3–4, 9–15). The contention is clearly without merit.

(a) The defendants called Dr. E. M. Perdue, as an expert witness. The prosecuting attorney objected to his examination, stating that "his license has been revoked," that "it is very unfair for him to bring a man here who has no license," and that "I ask the right to ask him if he hasn't a fraud order issued against him" (R. 536–537, 546–548). The trial court promptly sustained the objections of petitioners' counsel, admonished the jury to disregard the statements, rebuked the prosecuting attorney and ordered him to be seated (R. 536–537, 546–548). There was no motion for a mistrial.

The Circuit Court of Appeals characterized this conduct as "outrageous," "unethical," and "highly reprehensible" (R. 1204) but concluded that "this conduct, although reprehensible and improper, could not have been prejudicial" (R. 1205). This conclusion was clearly correct. At the most, the improper remarks tended to discredit the witness. Although defense counsel said, in summation, that "I think Dr. Perdue knows more about cancer today than any other living man" (R. 832), the witness was fully discredited by his own testimony which included, among other things, that he did not pass the medical board of the State of Missouri but was licensed to practice by an act of the legislature (R. 545), and that cancer "technically, is a hyperalkaline, auto-intoxication" (R. 548), that the advanced research method of diagnosis is "by oscillation," explained as follows: "just draw a little sample of blood about halfway between the knuckle on the thumb and the thumbnail, take that onto a piece of blotting paper and get enough blood out of that to make a spot on that white blotting paper as big as a five-cent piece, and then put that in a powerful high-rate electronic machine and turn that machine on the dial and when the dial records it will tell you just what kind of tumor or what kind of disease that patient has and where it is and how bad it is and you can do all that in ten minutes" (R. 562; see also R. 579–581).

(b) Two of the witnesses called by the defendants to testify that they were cured by the Baker treatments were asked on cross-examination if they had not had syphilis or gonorrhea (R. 493, 535). These questions are urged to constitute abuse of the witnesses, as the defense argued in summation (R. 849). No objections were made to these questions at the time and the witnesses had previously testified to their symptoms and to the diagnosis made when they entered the Baker Hospital (R. 489–493, 533–535). It is obvious, as the Circuit Court of Appeals held, that there was "neither error nor prejudice" (R. 1193).

(c) Of the many other instances alleged to constitute statements of matters not in evidence and misstatements of testimony (Petition, p. 12, Brief, p. 10, 12–14) appeals to passion and prejudice (Petition, p. 12, Brief, p. 11) and expressions of personal opinion (Petition, p. 13, Brief, pp. 11–12) it is enough to say that, taken individually and cumulatively, nothing is shown that can seriously be urged as ground for reversal. The conduct was either justifiable (*e. g.,* the prosecuting attorney's argument to the jury with respect to the test cases (R. 794–800) and the guarantee (R. 869) and the close of his summation (R. 805)) or it was unchallenged (R. 794–800, 869, 799, 804, 885, 886, 799, 804, 884, 885) or corrected by the trial court (R. 306, 312, 323, 536, 537, 588, 805).

In view of the length of the trial, the weight of the evidence of guilt and a comparison of the summations by the prosecution (R. 788–805, 864–887) and the defense (R. 806–864), the contention that there was misconduct impairing the fairness of the trial rests upon inescapably trivial grounds. *Cf. United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 237; *Berger* v. *United States,* 295 U. S. 78, 89; *United States* v. *Buckner,* 108 F. (2d) 921, 928–929 (C. C. A. 2d), certiorari denied, 309 U. S. 669.

II

Petitioners argue (Brief, pp. 15–21) that the trial court erred in holding that witnesses who testified that they were benefited by treatment at the Baker institutions could not testify that they were told by other doctors that they had cancer; and in excluding letters written to the witnesses which contained those statements. The Circuit Court of Appeals said that this "evidence was offered generally and not for any limited purpose" and that the "offer of proof contained no suggestion that the witness had communicated the alleged conversation to the defendants or hospital authorities" (R. 1194). In some instances this was not so. The evidence was offered only to prove the good faith of the defendants; and the information was communicated to them (R. 450–455, 460, 503). Nevertheless, we think the ruling of the District Court was correct. Since the evi-

dence was inadmissible as hearsay to prove that the patients were, in fact, suffering from cancer, it was irrelevant to show good faith. Reliance upon the unverified statements of others as to the ailments of patients who submitted themselves to the defendants for treatment, rather than upon their own diagnosis, can hardly be said to constitute a basis for claiming in good faith that the defendants had a cure for cancer. Moreover, it was not shown that the defendants relied upon the results in these cases to justify the claims they made for their treatments. Finally, even if the evidence were remotely relevant on the issue of good faith, we submit that it was within the discretion of the trial court to exclude it as unduly prejudicial.[2] See Wigmore on Evidence (3d Ed.) § 1904. The decisions upon which the petitioners rely, sustaining the admissibility of testimonial letters in some cases to show good faith are, therefore, readily distinguishable. Cf. *Goldstein* v. *United States,* 63 F. (2d) 609, 615 (C. C. A. 8th).

III

Petitioners argue that the trial court erred in refusing to withdraw from the consideration of the jury four of the alleged misrepresentations

[2] The trial court's ruling was put upon the ground that the evidence would "probably poison the minds of the jury," that "you might as well introduce it for all purposes, if that is read to the jury" (R. 455).

charged in the indictment, since, they assert, there was no evidence to prove they were false (Petition, pp. 6–7, Brief, pp. 22–30). We think the Circuit Court of Appeals properly held the evidence "sufficient to warrant the jury in returning a verdict on each of the matters referred to in these requested instructions" (R. 1202).[3] Moreover, it is not necessary that all the alleged false representations be proved if the misrepresentations which are proved support a finding that the scheme charged was in fact devised. *Cowl* v. *United States,* 35 F. (2d) 794, 798 (C. C. A. 8th); *Goldstein* v. *United States,* 63 F. (2d) 609, 612 (C. C. A. 8th); *Dilliard* v. *United States,* 101 F. (2d) 829 (C. C. A. 2d), certiorari denied, 306 U. S. 635. Nor do we think it essential that the trial court instruct the jury to disregard every allegation of the indictment upon which no proof is presented, so long as there is evidence of the scheme alleged. *Shreve* v. *United States,* 103 F. (2d) 796, 813

[3] It is true that one of the representations alleged—"that in the event the cure was not perfected during the patient's first stay at the Hospital, then all future treatments administered to the patient would be done by the defendants free of any charge or cost to the patient except for room, board, and transportation"—was not strictly proved by the defendants' "Patient Guarantee" (R. 261–262) which agreed to "treat free any patient who suffers a recurrence * * * after we have discharged the patient *as cured.*" It was, nevertheless, open to the jury to find that the references to the guarantee (e. g., R. 219, 229) were calculated to give the impression alleged. See R. 869.

(C. C. A. 9th), certiorari denied, 296 U. S. 654; *Goldstein* v. *United States, supra;* see also *Clift* v. *United States,* 22 F. (2d) 549 (C. C. A. 6th). In *Nash* v. *United States,* 229 U. S. 373, upon which petitioners rely, the issues of law and fact were complex and inter-related and the trial court erroneously directed the jury to consider allegations which the prosecution had withdrawn. In the present case, the trial court charged that the jury should determine whether there was a scheme to defraud "such as set out in the indictment or substantially so" (R. 903; see also R. 896, 897, 901, 908). Moreover, even if the Court were obliged to instruct the jury that particular representations were unproved, it would be necessary to show that its failure to do so resulted in prejudice to the defendants (Cf. *Dilliard* v. *United States, supra,* in which the point was explicitly raised in the petition for certiorari). Such a showing is impossible in the instant case.

IV

The indictment in the instant case alleges that the defendants at the time of the making of the various representations charged therein "well knew" them to be false and fradulent (R. 4, 5–6). Petitioners contend, therefore, that the court erred in instructing the jury to consider, in determining the petitioners' good faith, not only whether petitioners knew the representations

charged were false but also whether they were made "recklessly or negligently without regard to their truth or falsity" and "without making proper investigation to see if they are true" (R. 897).

Petitioners contend that the trial court thereby submitted to the jury an issue which was not within the indictment. As stated by the court below, however (R. 1199), no such objection was made at the trial. (See R. 913.) Moreover, the charge that the representations were knowingly false was legally equivalent to the charge that they were made in reckless disregard of the truth. *Stunz* v. *United States,* 27 F. (2d) 575, 579 (C. C. A. 8th); *Knickerbocker Merchandising Co.* v. *United States,* 13 F. (2d) 544 (C. C. A. 2d) certiorari denied, 273 U. S. 729. At the most, there was a technical variance which, as the court below held, could not have been prejudicial (R. 1199).

V

Petitioners contend that the conviction rests upon circumstantial evidence as consistent with innocence as with guilt and upon the jury's choice between the conflicting views of experts as to a matter of medical opinion. We think the facts outlined in the Statement (*supra,* pp. 3–11) make clear that, as the court below held, there was substantial evidence that the defendants were engaged in a scheme to defraud. To call the differ-

ence between the Government's experts and those upon whom the defendants relied (see p. 12, supra) a difference of "opinion" is an abuse of the concept of opinion. And while the defense introduced the testimony of witnesses who claimed to have benefitted from the Baker treatments, it was not shown in any case that these people suffered from cancer or from any of the other diseases with respect to which the representations were made.

CONCLUSION

Petitioners had a fair trial and the verdict is supported by substantial evidence. No question of importance is presented and there is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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